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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

BETWEEN THE LINES
PRODUCTIONS, LLC, a
California limited liability
company,

Plaintiff,

vs.

LIONS GATE ENTERTAINMENT
CORP., a British Columbia
corporation, and
SUMMIT ENTERTAINMENT,
LLC, a Delaware limited liability
company

Defendants.

SUMMIT ENTERTAINMENT, LLC,
a Delaware limited liability company

Counterclaimant

vs.

BETWEEN THE LINES
PRODUCTIONS, LLC, a California
limited liability company

Counter-Defendant.

Case No. 2:14-cv-00104-R (PJWx)

Hon. Judge Manuel L. Real

**COUNTER-DEFENDANT
BETWEEN THE LINES
PRODUCTIONS LLC'S ["BTLP"]
NOTICE AND NOTICE OF
MOTION FOR SUMMARY
JUDGMENT AS TO COUNTS I-V
OF SUMMIT'S COUNTERCLAIMS
[R. 16] PURSUANT TO FED. R. CIV.
P. 56(c)**

Hearing Date: November 17, 2014

10:00 a.m.

Trial Date: November 25, 2014

KEY DEFINITIONS¹

♦ ♦ ♦

BTLP's Non-Infringing Works

♦ **"Imaginative Works"** refers to BTLP's imaginative speech content expressed through motion pictures, audio-visual works and pictorial/graphic works, as those terms are defined by the Copyright Act, 17 U.S.C. § 101. All of BTLP's Imaginative Works are copyrighted (or copyrightable) work product that convey artistic speech content. The *Twiharder* Feature and Movie Promo Materials, as defined below, are Imaginative Works.

♦ **"*Twiharder* Feature"** refers to BTLP's feature-length motion picture *Twilight* parody entitled "*Twiharder*."²

♦ **"Movie Promo Materials"** refers to BTLP's audio-visual works (e.g., "trailers" and "music videos"); pictorial/graphic works (e.g., movie posters, "artwork," DVD covers); and website at <www.twiharder.com>>, all of which are used to promote the *Twiharder* Feature.³

BTLP's NON-INFRINGEMENT MARKS

♦ **"TWIHARDER Marks"** shall refer to the word mark BTLP uses as a title to describe the *Twiharder* Feature; and to the stylized logo BTLP uses

¹ As used through BTLP's submission on Rule 56.

² Summit claims that BTLP's use of the TWIHARDER mark to describe or be embodied within the "*Twiharder* Movie" violates the Lanham Act and its state analogues. See Counterclaims, R. 16 at ¶¶ 19, 24, 32, 34, 40, 60, 62.

³ Summit claims that BTLP's use of the TWIHARDER mark in connection with the "Movie Promo Materials" violates the Lanham Act and its state analogues. *Id.* at ¶ 20.

1 *within* any one of BTLP's Imaginative Works.

2 BTLP'S NON-INFRINGEMENT USES

3 ♦ **"Non-Trademark Uses"** shall refer to BTLP's use of the mark
4 TWIHARDER as a work title to describe any one of BTLP's Imaginative
5 Works; or as a stylized logo to be *embodied within* any one of BTLP's
6 Imaginative Works.

7 ♦ **"CafePress Uses"** shall refer to BTLP's alleged use of the mark
8 TWIHARDER in connection with the licensing or distribution of
9 merchandise (e.g., clothing, coffee cups, T-shirts, etc.) alleged in ¶ 21 of
10 Summit's counterclaims.

11
12 SUMMIT'S REGISTERED MARKS

13 ♦ **"TWILIGHT Marks"** shall refer to 49 (out of 51 total) registered
14 trademarks and servicemarks identified in paragraph 10 of Summit's
15 counterclaims. The TWILIGHT Marks consist of thirty-four (34) word mark
16 registrations and fifteen (15) stylized mark registrations. Each of the
17 TWILIGHT Marks consists of the dictionary word "Twilight." Summit
18 alleges THE TWILIGHT SAGA (19 word marks); TWILIGHT (12 word
19 marks); BELLA TWILIGHT. Summit also alleges 15 stylized TWILIGHT
20 marks
21

22 ♦ **"TWIHARD Marks"** shall refer to 2 (out of 51) total registered
23 marks identified in paragraph 10 of Summit's counterclaims. On September
24 10, 2010, Summit first applied for the TWIHARD Mark as an "Intent to Use"
25 application. Summit did not begin using the TWIHARD Marks in
26 commerce until late 2011. Summit concedes that the TWIHARD Marks are
27 only actionable with respect to clothing articles.
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1 **MOTION FOR SUMMARY JUDGMENT IN FAVOR OF**
2 **BTLP AS TO COUNTS I-V OF SUMMIT'S COUNTERCLAIMS**

3 **PLEASE TAKE NOTICE** that BTLP seeks summary judgment against
4 Summit Entertainment, LLC under Fed. R. Civ. P. 56 as to all of its
5 counterclaims [Counts I-V] [R. 1, p. 30 *et seq.*] and such motion is presented
6 for hearing on November 17, 2014 at 10:00 AM, or at any other time ordered
7 by the Court, at the courtroom of the Honorable Judge Manuel L. Real, 2nd
8 Floor, Courtroom 8, at 312 N. Spring Street, Los Angeles, California, 90012.
9 The grounds for summary judgment are stated below.

10
11 **Summit's Counterclaims [Counts I-V]**

12 ♦ As to Count V (copyright infringement), BTLP seeks entry of judgment
13 against Summit on three separate grounds:

14 (i) The *Twiharder* Feature and Movie Promo Materials are privileged
15 under the First and Fourteenth Amendment because they comprise artistic
16 work parody which ridicules Summit's famous and *controversial* works.

17 (ii) The *Twiharder* Feature and Movie Promo Materials are non-
18 infringing under the codified doctrine of "Fair Use," 17 U.S.C. § 107.

19 (iii) Summit's claims are barred by the Copyright Misuse doctrine
20 because it alleged harm to *Breaking Wind* – as opposed to *The Twilight Saga*.

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23 ♦ As to Count I (false designation of origin/unfair competition under 15
24 U.S.C. § 1125(c)) [R. 16, ¶¶ 31-38, PageID#: 418] and Count II (trademark
25 infringement under 15 U.S.C. § 1114 and common law) [R. 16, ID#: 418 at ¶¶
26 39-46], BTLP seeks entry of judgment against Summit on four separate
27 grounds:
28

1 (i) BTLP's use of the TWIHARDER marks within or in reference to
2 BTLP's "Imaginative Works" are immunized from Lanham (Trademark) Act
3 liability by the First Amendment.

4 (ii) Summit has failed to produce any evidence that Summit used
5 the mark TWIHARD in actual commerce at any time before Summit applied
6 for an "Intent to Use" application in September 2010 [which was more than
7 five (5) months after BTLP began to actively use and display the
8 TWIHARDER marks in actual commerce).

9 (iii) Summit has failed to produce any evidence that BTLP used the
10 mark TWIHARDER in commerce to sell any merchandise (clothing, coffee
11 cups, tangible goods) to *bona fide* purchasers. Moreover, because Summit
12 has failed to produce any evidence of damages or BTLP's profits derived
13 from the sale of merchandise, and because BTLP's Cafepress.com site was
14 shut down in July 2012, Summit's request for an injunction is moot under
15 Article III and therefore non-justiciable.

16 (iv) No reasonable juror could return a verdict in Summit's favor as
17 to the likelihood of confusion between the TWIHARDER marks vis-à-vis *any*
18 of the TWILIGHT marks. [R. 16, ¶ 10, PageID#: 407].

19
20 ♦ As to Count III (trademark dilution by blurring and tarnishment under 15
21 U.S.C. § 1125(c) and Cal. Bus. & Prof. Code § 14247) [R. 16, ¶¶ 47-56, ID#: 420], BTLP seeks entry of judgment against Summit on two separate
22 grounds:
23

24 (ii) BTLP's Imaginative Works fall within the "non-commercial"
25 exception under the Trademark Dilution Revision Act of 2006 and are
26 therefore non-actionable as a matter of law.
27
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1 (iii) Summit's TWILIGHT Marks are "tarnish-proof" based on
2 Summit's licensing of their own *Twilight* film parody containing
3 unwholesome and tawdry material.

4
5 ♦ As to all state analogue causes of action alleged under Count I-III and
6 Count IV (unfair competition under Cal Bus. & Prof. Code §§ 17200 *et seq.*
7 and common law) [R. 16, ¶¶ 57-63, ID#: 422], BTLP seeks entry of judgment
8 against Summit on grounds that the cause of action is predicated on
9 allegations that are "substantially congruent" to the facts alleged in support
10 of Summit's Lanham Act claims under Counts I-III.

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13 This Rule 56 motion is based on this Motion and Notice of Motion, the
14 supporting Memorandum of Points and Authorities, BTLP's Statement of
15 Uncontroverted Facts, the Supporting Documents Cited in the Record, and
16 physical exhibits (DVDs / Videos) (which were previously lodged with the
17 Court or which shall be delivered forthwith). A Proposed Order is
18 submitted via separate docket entry.
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